JD–42–10
Baltimore, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COSTCO WHOLESALE CORP.

and Case 5–CA–35393

TEAMSTERS LOCAL UNION NO. 311,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL–CIO

Chad M. Horton and *Richard A. Block, Esqs.,*
for the General Counsel.
Paul W. Galligan, Esq., (Seyfarth Shaw LLP),
of New York, New York, for the Respondent.
James R. Rosenberg, Esq., (Abato, Rubenstein and
Abato, P.A.), of Baltimore, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Baltimore, Maryland, on May 13, 2010. The charge was filed November 12, 2009, by Teamsters Local Union No. 311, International Brotherhood of Teamsters, AFL–CIO (the Union or the Charging Party) and the complaint was issued February 26, 2010. The complaint alleges that Costco Wholesale Corp. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. The Respondent denies any unlawful conduct.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

At the beginning of the trial the counsel for the General Counsel moved to amend paragraph 2(a) of the complaint to allege the Respondent's state of incorporation as Washington State rather that the District of Columbia. The amendment was granted and the Respondent subsequently moved to amend its answer to admit paragraph 2(a) of the complaint. Accordingly, I find that the Respondent is a Washington State corporation with an office and a place of business in Baltimore, Maryland, where it has been engaged in the sale and distribution of

merchandise and services at its warehouse facilities. During the calendar year 2009, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000 and purchased and received at its Baltimore, Maryland facility products, goods, and material valued in excess of $50,000 directly from points located outside the State of Maryland. The Respondent admits and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Costco facility involved in this proceeding is the White Marsh warehouse. The manager of that facility is James Greenwood, a 15 year employee of the Respondent who has been in his current position since 2005. In his capacity as the warehouse manager Greenwood is responsible for the day-to-day operation of the warehouse. Greenwood is the highest ranking company official on the site and he is identified in the complaint and the person who allegedly made the unlawful statements. The warehouse contains various sales departments, such as pharmacy, produce, bakery, and optical. Approximately 200 people are employed at the White Marsh warehouse. The Union has represented the employees for at least 15 years. Although Greenwood has never represented the Respondent in collective-bargaining negotiations he is involved in the grievance procedure.

The Respondent conducts an annual meeting for all it's managers. The meeting is held at the Respondent's headquarters in the State of Washington during the first week of August. Greenwood attended that meeting in 2009. He also attends meetings for regional managers, that are held four or five times a year in Sterling, Virginia. Greenwood attended one such meeting in either September or October 2009. Also present at that meeting was the Respondent's director of labor relations and his associate, both of whom are members of the Respondent's collective-bargaining negotiating committee. During the meeting the mangers, including Greenwood, were asked to identify sections of the collective-bargaining agreement that they believed should be changed. Collective bargaining for the new agreement began on October, 28, 2009. The then–current collective-bargaining agreement terminated in March 2010.

Employee Karen Miller is a cashier at the White Marsh warehouse where she has worked for over 13 years. Miller has been a member of the Union for 3 years, and has been a shop steward for slightly over a year. She is also a member of the stewards' negotiating committee. That committee and union officials meet in the District of Columbia to discuss collective-bargaining goals and objectives. In order to attend those meetings stewards must have the approval of management to be absence from work on the day of the meeting. Some time before October 19, 2009, Miller asked Greenwood for his approval to be absent on November 24 to attend the first stewards' negotiating committee meeting. Greenwood did not give an immediate reply.

Employee Shirley Benny has been a employed as a forklift operator by the Respondent since 1988. She joined the Union when she was hired and has been a shop steward for approximately 15 years. Benny had previously been involved in three or four collective-bargaining negotiations with the Respondent. During those bargaining sessions the stewards sat

at the bargaining table. She had been informed by a union official that during the upcoming negotiations the stewards would not be seated at the table. Based on her experience Benny knew when the negotiations would start because they began about the same time every 3 years.

B. The Alleged Violations of Section 8(a)(1)

1. Complaint paragraph 5(a)

In paragraph 5(a) it is alleged that Greenwood told employees that negotiations did not mean anything, because James Sinegal (the Respondent's president and chief executive officer) had already determined what employees would receive in the new contact. In support of this allegation employee Karen Miller testified that on or about October 19, 2009, between 12 and 12:30 p.m., she was in the outer office of the warehouse. It was just before the start of her shift. Greenwood approached her and said that "he was not sure that he would be able to allow me to have off on [November 24] because there was going to be a walk of the building." The day in question was the first day of the stewards' negotiating committee meeting. A walk through is an inspection of the facility by Greenwood's superiors. Miller offered a mild protest and Greenwood replied that the stewards' "negotiation meetings were really a waste of time and that there was no need for us to attend them because Mr. Sinegal had already determined what he was going to allow us to have in our new contract" (Tr. 18). Greenwood then told her not to expect any raises because the economy was bad. Nothing more was said and Miller estimated that the conversation lasted about 5 minutes. Miller was permitted to attend all the stewards' negotiating committee meetings.

Greenwood testified that "[t]he only thing I remember is either I was going out or she was coming in, I'm not sure. Something was brought up about negotiations, and my statement was whatever is negotiated, Jim [Sinegal] would decide" (Tr. 45). Greenwood could not recall how the issue of negotiations came up, he could not recall if the stewards' meeting was raised, nor could he recall "what Karen said to me." He did, however, aver that he did not tell Miller that the meetings were a waste of time, and that he did not say that Sinegal had already determined what was going to be in the contract. He also offered that the conversation "couldn't have been that long."

2. Complaint paragraph 5(b)

In paragraph 5(b) it is alleged that Greenwood in or around mid-October 2009, told an employee that employees would not be receiving wage increases in the new contract. Employee Shirley Benny testified that Greenwood made the statement to her some time during mid-October. Benny recollected the conversation occurred just before the warehouse normally opened for business. She was using her forklift to move merchandise in preparation for the warehouse to open and the customers to enter. She saw Greenwood standing at the end of the main aisle toward the front of the building. He appeared to be watching her. She drove up to him and asked what he wanted. He told her that contrary to past negotiations stewards would not be seated at the bargaining table. Benny replied that she already knew that. He replied that "we weren't getting raises, and nobody is getting raises" (Tr. 34). She asked him how he knew that. When Greenwood did not reply she said "that remains to be seen and drove away." Benny testified that there had been no previous conversations concerning negotiations with Greenwood and that there were none afterward.

C. Credibility Resolutions

I find that both Miller and Benny exhibited impressive testimonial demeanor coupled with thoughtful, detailed recollections. Their testimony was convincing and forthright, without fabrication, exaggeration, or evasiveness. Their testimony was consistent on direct and cross-examination. Although on cross-examination Benny may not have always used the same words when quoting Greenwood's alleged statement concerning raises, she never deviated from the theme that "nobody was getting a raise" and that nothing more was said. Their testimony is also similar. Thus, they both testified that Greenwood initiated the conversation and then steered it towards negotiations. He also told each of them that no raises would be forthcoming as a result of the upcoming negotiations.

While I was observing and listening to Miller and Benny testify I was mindful that they are shop stewards as well as employees. Nevertheless, I detected no bias or self-serving statements in their testimony. Nor can I envision a motive for them to have invented their stories. Based on my observations and their testimony, I do not believe that either employee took any joy from testifying against the Respondent in general, and Greenwood in particular.

Greenwood's testimonial demeanor was unimpressive. Unlike Miller and Benny's detailed and specific recounting of the conversations, Greenwood could recall very little. Moreover, he appeared to be disinclined to make any effort to recall anything. Basically his testimony consisted of denying that he said any of the alleged unlawful statements. Based on Greenwood's less than forthcoming demeanor, and his "comparative vagueness," I find him to be an unreliable witness. *Precoat Metals,* 341 NLRB 1137, 1150–1151 (2004) (and cited cases). I find that Miller and Benny's testimony is more accurate and trustworthy. I credit their testimony and I find that Greenwood said the statements as alleged in the complaint.

D. Analysis

Section 7 of the Act (in pertinent part) provides that employees can join unions and bargain collectively. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." It has long been settled that the test for determining whether an employer's statements or actions violate Section 8(a)(1) is objective. Thus, the employer's intent or motive is irrelevant, as is the success or failure of the unlawful statement or conduct. Rather, the test is whether the Respondent's conduct or statement "may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act." *El Rancho Market,* 235 NLRB 468, 471 (1978), citing *American Freightways Co.,* 124 NLRB 146 147 (1959). The statements at issue satisfy this objective standard.

Greenwood's statement to Miller—that there was no need for her to attend the stewards' negotiating committee meeting because the Respondent's CEO had already determined the terms of the collective-bargaining agreement—was an unambiguous statement of the futility of engaging in the collective-bargaining process, that would tend to coerce employees. See *Smithfield Foods,* 347 NLRB 1225, 1230 (2006). Similarly, telling Benny that employees would not receive wage increases in the new collective-bargaining agreement conveyed to the employees that the outcome of the collective-bargaining process was foreordained and thus

engaging in the process is futile, and that statement would also tend to coerce employees. Id. at 1229–1230; *El Rancho Market,* above at 472.

Greenwood's statements violate Section 8(a)(1) because they reasonably convey to employees that it is futile to engage in collective-bargaining with the Respondent, a right guaranteed by Section 7 of the Act. Greenwood's unlawful statements are not mere intemperate remarks of personal opinion as argued by the Respondent. And thus, they are not protected by the free speech provisions of Section 8(c).

The Respondent also contends that the statements are de minimis—that is, they are so minimal and isolated that they do not furnish a sufficient basis for either finding a violation or issuing a remedial order. A perusal of the cases cited above establishes that the Board has found statements such as those made by Greenwood to be violations of Section 8(a)(1) and that they must be remedied. In *Smithfield Foods,* above at 230, the Board, citing *Swingline Co.,* 256 NLRB 704, 716 (1981), found that an employer's statement that it was in complete control over the outcome of negotiations is not consistent with a commitment to good-faith bargaining. That statement is equally applicable here, especially when considering that Greenwood is the highest ranking official at the facility.

Square D Co., 204 NLRB 154 (1973), is submitted by the Respondent as offering the most direct support for it's contention that the violations found here are de minimis. In *Square D*, a supervisor's comment to a union steward that the union should stop filing grievances over walk-space obstructions was found to be de minimis. In making that finding the Board stressed that the "supervisor's remarks do not evidence a rejection by the Respondent of the principles of collective bargaining." Id at 154. The opposite is true in this case. *Smithfield Foods,* above at 230.

Two of the other cases relied on by the Respondent are also distinguishable because the unlawful conduct had been substantially remedied, the third is otherwise inapposite. In *Bellinger Shipyards,* 227 NLRB 620 (1976), the unlawful no-solicitation rule was replaced by a new rule a month before the complaint issued; in *Wichita Eagle & Beacon Publishing Co.,* 206 NLRB 55 (1973), the filing of a decertification petition by a supervisor was found to be de minimis because the employer told the union that it would continue to bargain with the union and the supervisor withdrew the petition. Finally, the last and least, is *L & L Shop Rite, Inc.,* 285 NLRB 1036 (1987), although the Board agreed with the judge's conclusion, it did not apply his "de minimis" rationale. Instead the Board dismissed the complaint because of the General Counsel's failure to prove that the union did not have a reasonable alternative means to communicate with its intended audience. Id. at 1039.

I also reject the Respondent's argument that it's actions of allowing Miller to attend the stewards' negotiating committee meetings, and "negotiating a fair contract from the get go," some how removes the need for a remedial order. Based on the foregoing I find that the violations are not de minimis and that a remedial order is necessary.

CONCLUSIONS OF LAW

1. The Respondent, Costco Wholesale Corp., is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union No. 311, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by.

(a) Telling an employee that negotiations did not mean anything, because the Respondent's chief executive officer had already determined what the employees would receive in the new contract.

(b) Telling an employee that employees would not be receiving wage increases in the new contract.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically I shall recommend that the Respondent post a notice to employees in which it promises not to engage in like or related conduct which interferes with, restrains, or coerces its employees in the exercise of rights guaranteed by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Costco Wholesale Corp., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that negotiations do not mean anything, because the chief executive officer has already determined what the employees will receive in the collective-bargaining agreement.

(b) Telling employees before the start of collective-bargaining negotiations that they would not receive wage increases in the collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its White Marsh facility in Baltimore, Maryland, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(c) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. , August 4, 2010.

_____
JOHN T. CLARK
Administrative Law Judge

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT tell you that negotiations do not mean anything, because our chief executive officer has already determined what you will receive in the collective-bargaining agreement.

WE WILL NOT tell you that you will not receive wage increases in the next collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

COSTCO WHOLESALE CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor
Baltimore, MD 21202-4061
Hours: 8:15 a.m. to 4:45 p.m.
410-962-2822.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-2864.